No. 87-2086

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

DAVID A. BOONE, et al.,
Petitioners,

VS.

REDEVELOPMENT AGENCY OF THE
CITY OF SAN JOSE, et al.,
Respondents.

PETITIONERS' REPLY BRIEF

HERBERT F. KAISER
The Alcoa Building Suite 1600
One Maritime Plaza
San Francisco, California 94111
Telephone: (415) 392-1184
Attorney for Petitioners
David A. Boone, et al.

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864 2300

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases

Codes

REASON FOR GRANTING WRIT

The Agency's Giving Koll Market Power by Monopoly and Acceding to Koll'S Demand to Deny Essential Parking Facilities to Competitors, So That Koll Could Predatorily Acquire Their Businesses, Is Not a "Necessary and Reasonable Consequence" of Engaging in Redevelopment in This Market

REPLY ARGUMENT

I

DETAILED ACCURATE STATEMENT OF THE RECORD DISTORTED BY RESPONDENTS

Respondents, unable to meet the issues raised by the Petition herein, have instead substituted their own version of Petitioner's position, grossly distorted the record to deny the detailed allegations and their Briefs in Opposition replied to that made-up version ignoring controlling statutes and case law.[1]

A. 1975 Legal Plan Allowing Private Enterprise To Develop And Alleviate Blight

The 1975 plan, although finding blight, found that private enterprise could alleviate it without condemnation or anti-competitive conduct.[2]

By 1981 blight had been eliminated by private enterprise in the context of *Regus v. City of Baldwin Park*, 70 Cal.App. 3d 968 at 980 (1977) Petition p. 10. and there was a shortage of essential parking facilities to operate the businesses that had developed. Petition, Appendix, SAC, ¶ 20, A-42-43.[3]

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[1] Respondents start out by misleading the court when they state Frank Taylor the named executive director never appeared in the action in the motions to dismiss prior to the appeal. Agency attorney Mr. Khourie stated at both hearings to dismiss that he represented defendant "Mr. Taylor". (Reply Brief Appendix C-1, C-2)

[2] Supplemental Brief Appendix B-2; B-14.

[3] See colored photos of buildings developed in the area prior to Koll building, Appendix "D" to Petition, Docket # 90, A-66-86.

The plan recognized the 1971 judicially noticed "*fact of life that the availability of parking facilities is essential to commercial enterprise in highly developed areas.*" *City of Los Angeles v. Wolfe*, 6 C.2d 326, 336; 99 CR 21 (1971), and provided for parking by public improvements.[4] But *private enterprise*, as required in Health and Safety Code Section 33037(b)(A-190), without public participation or assistance had *acquired the land, planned and financed the land assembly, clearance and construction of improvements.*

B. 1983 Illegal Amended Plan Without Necessary Finding Of Blight Or Necessary Finding That Private Enterprise Could Not Alleviate The Blight

In December 1983, the executive director of the Agency vigorously orchestrated with the Koll Company an illegal Amended Plan (the "Plan") which falsely stated that the amended Plan conformed to state law and which provided for condemnation and other anti-competitive activity although no finding of blight or inability of private enterprise to alleviate blight was made or could have been made.[5]

C. Legislative Intent

California Health and Safety Code Sections 33030, 33031 C-4), 33032, 33037(b) and 33352 (C 188-190) were enacted to eliminate perceived abuses by Redevelopment Agencies which would acquire land and publicly finance projects when it was probable that the development would have occurred anyway through natural market process. Those statutes required a finding of (1) blight and (2) that private enterprise could not alleviate it, *Emmington v. Solano County Redevelopment Agency*, 195 Cal.App.3d 491 at 497 (1986). The legislative hearings and testimony clearly show that private enterprise was to be en-

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[4] Supplemental Brief, Appendix I, B-2-3.

[5] Supplemental Brief, Appendix VI, B-15.

couraged to develop without public expenditure except for the infrastructure.[6]

D. Detailed Allegations In SAC Of Overt Acts Of Koll With Participation And Vigorous Orchestration Of Agency Director

Even without any discovery,[7] Petitioner's allegations were quite detailed. In the month of April, 1981, Koll developed its scheme. (SAC, ¶¶ 25 and 26.) It took steps to develop the scheme including paying inducements (SAC, ¶ 27)[8] and in the Spring of 1981 met with Agency defendants and made certain detailed agreements (SAC, ¶ 28). In furtherance of the scheme Koll got the Agency officials to demand that Petitioner build a larger than planned building and *insist* that Petitioners not plan for their own adequate on-site parking (SAC, ¶ 29).

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[6] Legislative intent, Petition, Appendix F. A112: They reason that much of the "redevelopment" attributed to formation of the agency is really "development" which might well have occurred without the project and the concomitant loss of revenue to other taxing entities." A118-119.

"The League (of cities) believes, however, that government should use redevelopment as a stimulant to the local economy only when private market forces appear incapable of significantly improving declining areas within a reasonable time. Community development planning should identify the role of the private sector in supporting local economy policy and plans. Government action using redevelopment authority should occur where the private sector will not or cannot further local goals."

[7] Petitioners were prevented from taking any discovery up to the hearing on the 12(b)(6) motion to dismiss the first amended complaint set for 5/20/85. That hearing was continued to 7/9/85 and the order remanded in effect. On 7/9/85, the date of the hearing, petitioners were given only 15 days to amend, thus by court order in contested hearings Petitioners were denied any discovery. Appendix to Reply Brief, Portions of Transcript of 7/9/85 hearing, C-1.

[8] These financial inducements included illegal campaign contributions above the $250.00 limit to City Council, Petition, Appendix "J" A-164-174; Members of the City Council also profited from an illegal bond issue to finance the Koll project. Petition, Appendix "K" A-176.

The conspiracy continued, with most of the dirty work done by Agency personnel (SAC, ¶¶ 30-31), but on April 8, 1982, a further secret agreement was entered into by Koll and Agency officials, to illegally monopolize the market with an agreement which included an illegal avoidance of normal governmental environmental review safeguards (SAC, ¶ 32; A-46).

Subsequently Koll and the agency director participated in false representations to the City legislative body involving violations of state law and participated in a false statement as to the validity of the Amended plan and false appraisal and analysis of the Koll project. ***alleged in the following cited key paragraphs of the SAC. (SAC, 38 (A-48-49) 57, 58, 59, (A-53-54.))***

E. Deception To Prevent Opposition To Amended Plan Within 60 Days And Thus Deny Access To Administrative And Judicial Processes

To deceive petitioners not to challenge the Amended Redevelopment Plan within the 60-day period provided for in H&S Code § 33500 they incorporated into the plan various provisions for ***"adequate land for parking and open spaces" and "parking facilities," "of benefit to the project area."*** (Appendix II, B-6-7).

SAC, ¶¶ 39-55 (A-49-53); ¶¶ 61-65 (A-54-55) describe in detail the deception of respondents.

Petitioners agreed to pay for their portion of the parking facilities pursuant to City ordinance.[9]

F. Koll Secretly Demanded That Agency Take Administrative Action To Deny Essential Parking

Its most significant illegal act was, in November 1984, to first announce a blood bath in competition and then to secretly demand that its co-conspirators formally renege on the 1975 and 1983 plans and provisions for essential parking and on the false promises that had been made to Petitioners. (SAC, ¶ 67, A-55.)

> "67. In November, 1984 Koll executives announced a 'Blood Bath' in competition for downtown office space rental

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[9] (SAC par. 62 (A-54); (SAC par. 55 (A- 52.))

> market. Koll anticipated that by being first to complete, plaintiffs might succeed in contracting with desirable tenants based on the belief that there would be a parking arrangement utilizing the Market Street garage. To prevent plaintiffs' building from absorbing the limited supply of office building tenants, Koll demanded that the Agency renege. In response to that demand, the Agency then formally reneged on its promise to plaintiffs of this alternate parking. Such actions was without any rational relationship to any permissible interest in the City."

Thus, Petitioners have alleged when and how Koll set up its conspiracy to monopolize, times and details in steps of setting it up, and the time and detail of the final step to destroy the business of Petitioners.

G. Antitrust Injury

As a result of the conspiracy by administrative denial by Taylor of essential parking as stated in both plans, four of the five developers, including Petitioners, were either forced into foreclosure and bankruptcy to be picked up by Koll, and two actually were forced to sell to Koll at distressed prices. (Petition p. 4)[10]

II

THE AGENCY LACKED STATUTORY AUTHORITY FOR ITS ACTION AND HENCE HAS NO IMMUNITY

Since there is a risk that public power will be exercised for private benefit, policies displacing competition must be clearly and affirmatively expressed. *Hoover v. Ronwin*, 467 U.S. 1268, 104 S.Ct. 3564 at 20004 (1984). The *Parker* rule, as developed in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S.Ct. 1713, 85 L.Ed. 26 (1985), and elsewhere holds that an action done by the state or authorized by the state is immune from antitrust liability. Crucial to this rule, as it applies to redevelopment agencies, is the limitation that the legislature must have

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[10] Petition, Appendices G and H (A-130-158). Petitioners Chapter XI proceeding (A-151).

intended to displace competition and that the challenged action must be authorized or contemplated, or foreseeable or "necessary and reasonable consequence of engaging in the authorized activity." *Town of Hallie, supra; Scott v. City of Sioux City,* 736 F.2d 1207, 1211 (8th Cir. 1984).

Town of Hallie supra requires that there be an *express limitation of powers* (Petition p. 8). The distinctions between this case and *Kern Tulare Water District v. City of Bakersfield,* 828 F.2d 514 (9th Cir.) *cert. denied.* 5/16/88 (C-4) and the reason certiorari was denied is that the challenged conduct in that action was not expressly prohibited, as in the instant action, there was only a general policy statement to wit: "*prohibition against waste and unreasonable use of water*", and no conspiracy was alleged between a government official and private developer to restrain trade.

The California legislature requires 2 conditions before redevelopment agency anti-competitive action is authorized: (1) a finding of active urban blight; (2) that private enterprise cannot reasonably be expected to alleviate it. *Emmington* and *Regus, supra.* (Petition, pp. 10-11.)[11] *Emmington* at p. 497 states:

> "Before a project area can properly be selected for redevelopment under the Community Redevelopment Law, it must be blighted. *In fact, the blighted condition of the area is the very basis of the redevelopment agency's jurisdiction to acquire the property by eminent domain and expend public funds for its redevelopment.* (cases omitted) The term 'blight' has never been defined with precision, nor can it be. However, the Legislature and courts have provided some guidelines. A two-part test is required to substantiate a finding of blight: First, the area must constitute a '*serious* physical, social, or economic burden on the community which cannot reasonably be expected to be reversed or alleviated by private enterprise acting alone.' Secondly, one of the characteristics of blight as set out in Health and Safety

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[11] H&S Section 33030, 33031(C-4); 33032; 33037(b); 33352 (Petition, Appendix A-188-190); 33368 (Municipal Respondent's Opposition Brief, Appendix A-6).

> Code sections 33031 or 33032 must exist. (Health & Saf. Code, § 33030, italics added.)" (Emphasis added)

Here, Petitioner and 4 other developers, pursuant to H&S Section 33037(b), without public participation or assistance, acquired, planned, financed, cleared and improved their land and eliminated blight (SAC, ¶ 20, A-42-43). *Regus,* supra p. 980.

There is no qualification, policy or statement in any statute, or case law providing that, as the Agency contends, the Agency is authorized to commit anti-competitive acts if government provides the necessary infrastructure, public improvements or public parking facilities even though private enterprise used its own funds to develop their buildings, purchased at fair market value without government subsidy, and pays for their portion of the parking facility.[12]

Neither requirement of the statutory conditions, were met by the Agency in adopting the 1983 amended plan. Respondent Agency never, in its Brief, addressed these issues of the controlling case law such as *Emmington, supra*, at 497; *Regus, supra,* at 980-983, which clearly restrict Agency authority and power to commit anti- competitive conduct without such findings. *Cine 42nd Street Theatre Corporation v. The Nederlander Organization*, 790 F.2d 1032 at 1036, cited by Respondent Agency also required a finding of blight before agency action was authorized. Thus, there was no reason why a monopoly to Koll was necessary to redevelopment where displacement of competition was not authorized, *Corey v. Look*, 641 F.2d 32 at 37 (1st Cir. 1981), and in fact expressly prohibited.

Thus, the Ninth Circuit decision is not consistent with the *Parker* doctrine as developed by *Town of Hallie, supra,* and in other federal jurisdictions. Without compliance with established state action prerequisites there can be no immunity from Sherman Act violations. Respondent Agency has cited no case holding that Sherman Act violations can be remedied by state corrective procedures with a 60-day time limit.

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[12] SAC ¶ 62, A-54, SAC par. 55 A-52.

III

THE GRANTING TO KOLL OF COMPLETE MARKET POWER AND EXCLUSIVE MONOPOLY IN PARKING DOES NOT INCREASE COMPETITION. PETITIONER AND THE OTHER DEVELOPERS HAVE SUSTAINED AN ANTITRUST INJURY

The Ninth Circuit has held in *Aydin Corp. v. Ferol Corp.*, 718 F.2d 897 at 907 (1983) that "whether a decrease in competition occurred and whether it was caused by the defendants' conduct are *factual matters* which, if disputed, must be resolved by the trier of fact." (Emphasis added.)

This requirement for a factual development was directed in both Supreme Court cases cited by respondent. *Brunswick Corp. v. Pueblo Bowel-O-Mat Inc.*, 429 U.S. 477, 97 S.Ct. 690 (1977); and *Cargel Inc. v. Manfort of Colorado, Inc.*, ____ U.S. ____, 197 S.Ct. 484, 492 L.Ed. 2d 427 (1986) where after full factual development and trial the proof did not establish that defendant committed any predatory conduct which injured competition.

In the instant action, Koll, for the agreed purpose of destroying competition and monopolizing the market, solicited the Agency director to administratively deny Petitioner and all other developers essential parking to operate their business (SAC, ¶ 67 (A-55-56)), yet the respondent frivolously and insincerely argues that Koll increased competition by its actions. The judicially noticed facts of the foreclosure, bankruptcy and forced sale of the existing businesses in the area by reason of the conspiracy should at least at this stage of the pleadings lead to an inference of antitrust injury (Petition, Appendices "G" and "H").

IV

THE ACTIVE PARTICIPATION BY AN AGENCY OFFICIAL IN A CONSPIRACY WITH A PRIVATE DEVELOPER IS NOT ENTITLED TO NOERR-PENNINGTON IMMMUNITY NOR DOES IT CONSTITUTE PROTECTED POLITICAL ACTIVITY, THAT CONDUCT BARRED ACCESS TO THE ADMINISTRATIVE AND JUDICIAL PROCESSES

A. The Detailed Allegations Of Koll Planning And Secret Agreements Combined With Agency Implementation And Deception Show Unprotected Activity.

The Ninth Circuit decision granting Noerr-Pennington immunity conflicts with Supreme Court, other circuits and its own decisions. Supreme Court from *Parker v. Brown*, 317 U.S. 341, 351 (1943) through the current decision in *Allied Tube & Conduct Corporation v. Indian Head Inc.*, 486 U.S.____; 108 S.Ct 1931, 1938 fn. 7 (1988),[13] holding that where the municipal official becomes a "*participant* in a private agreement or combination of others for restraint of trade" there can be no antitrust immunity for such conduct (*Parker*, p. 351.) which thus effectively bars access to agencies and the courts.

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 at 513, 514 (1972) is controlling in this action stating. at 513:

> "Insofar as the administrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of 'political expression.' "

at 514:

> "It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute."

The other circuits follow this Supreme Court authority *Affiliated Capital Corporation v. City of Houston*, 735 F.2d 1555 at 1566, found no Noerr-Pennington immunity entitlement where

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[13] Supplemental Brief p. 4 and 5.

the city official actively participated and, as in the instant action, vigorously orchestrated the conduct restraining trade. (*Scott v. City of Sioux City, supra*, at 1214, 1215.)

By reason of the conspiracy with the agency director petitioners were denied legitimate access to the agency and courts.

Regardless of Koll's characterization of factual findings by the district or appellate courts, on this appeal of a grant of motion to dismiss, the allegations of the Second Amended Complaint must be directly considered. Those allegations do not allege a pattern of legitimate public lobbying of government officials, legislative or otherwise. Koll contends it only sought publicly to build a building but the allegations of the SAC state much more. They do set forth a purposeful illegal scheme to use secret dealing with Agency officials to violate state law to destroy existing businesses and to monopolize.(SAC par. 67 A-55-56)

The agency acted in the commercial arena of office development and for that reason alone Koll's actions were unprotected (Supplemental Brief p. 8, 9)

Koll essentially contends that it can solicit illegal conduct with the active participation of the Agency director, and just because it gets it, is immune from antitrust liability. Indeed there can be no *Noerr-Pennington* immunity, in this case, because respondents claims of state action immunity have failed.

CONCLUSION

Respondents opposition is based on the erroneous and sham defenses that Agency anti-competitive activities were authorized by the state legislature, Koll's actions were legitimate political lobbying which is privileged, and that the detailed allegations stated herein were merely conclusory. The Ninth Circuit decision was based on these erroneous findings and its erroneous views of applicable law and therefore this petition should be granted and the decision vacated.

Respectfully submitted,

HERBERT F. KAISER
Attorney for Petitioners
David A. Boone, et al.

Appendix

In the United States District Court
For the Northern District of California

Reporter's Transcript of Proceedings

Before Hon. William A. Ingram, Judge

Tuesday, July 9, 1985

(Motions)

Morning Session

San Jose, California

Proceedings

The Clerk: Case Number C 84-20772, David Boone versus Redevelopment Agency.

Counsel, will you state your appearances, please?

Mr. Khourie: For the City of San Jose, Your Honor, and the *associated Defendants* there, myself, Michael Khourie, Jim Gilliland, Mark Jansen, Mr. Wallace and Mr. Reiners.

The Court: It's going to be 15 days to file the second amended complaint, and then you can brief in the normal manner thereafter.

Reporter's Transcript of Proceedings

Before: Honorable William A. Ingram, Judge

Thursday, November 21, 1985

(Motions)

Morning Session

San Jose, California .

Proceedings

The Clerk: Case No. C 84-20772, Boone Versus Redevelopment.

Counsel: May we have your appearances?

Mr. Khourie: Michael Khourie, Jim Gilliland and Mark Jansen for Plaintiffs—for defendants City of San Jose, San Jose—City of San Jose Redevelopment Agency, *and Mr. Taylor* (Phonetic).

§ 33030. Existence of blighted areas

It is found and declared that there exist in many communities blighted areas which constitute either physical, social, or economic liabilities, . . . requiring redevelopment in the interest of the health, safety, and general welfare of the people of such communities and of the state.

. . . A blighted . . . area is one which is characterized by one or more of those conditions set forth in Sections 33031 . . . or 33032, causing a reduction of, or lack of, proper utilization of the area to such an extent that it constitutes a serious physical, social, or economic burden on the community *which cannot reasonably be expected to be reversed or alleviated by private enterprise acting alone.*

(Amended by Stats.1976, c. 1336, pp. 6054, 6055, § 1.)

§ 33031. Blighted area; unfit or unsafe buildings

A blighted area is characterized by the existence of buildings and structures, used or intended to be used for living, commercial, industrial, or other purposes, or any combination of such uses, which are unfit or unsafe to occupy for such purpose and are conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, and crime because of any one or a combination of the following factors:

(a) Defective design and character of physical construction.

(b) Faulty interior arrangement and exterior spacing.

(c) High density of population and overcrowding.

(d) Inadequate provision for ventilation, light, sanitation, open spaces, and recreation facilities.

(e) Age, obsolescence, deterioration, dilapidation, mixed character, or shifting of uses.

(Added by Stats.1963, c. 1812, p. 3679, § 3.)

No. 87-1433. Kern Tulare Water District, Petitioner v. City of Bakersfield, California.

May 16, 1988. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 828 F2d 514.

Justice White, dissenting.

This Court has previously held that a municipality is immune from antitrust liability under the state action exemption if it can demonstrate that "it is engaging in the challenged activity pursuant to a clearly expressed state policy." Hallie v Eau Claire, 471 U.S. 34, 40 85 L Ed 2d 24, 105 S Ct 1713 (1985); see Parker v Brown, 317 US 341, 87 L Ed 315, 63 S Ct 307 (1943). It is not necessary that the legislature explicitly state that it intends municipalities to engage in anticompetitive conduct pursuant to the state policy; it is enough that "anticompetitive effects logically would result from [the] broad authority to regulate." Hallie, supra, at 42, 85 L Ed 2d 24, 105 S Ct 1713. From these principles, I had thought it clear that an antitrust violation would be established by showing that a municipality restrained trade by acting contrary to the clearly articulated state policy. Yet the Ninth Circuit has held here that ordinary "abuses" by local authorities in the field generally covered by the state policy are matters for state tribunals and not concerns of federal antitrust policy. 828 F2d 514, 522 (1987).

The mischief of this unwarranted expansion of the state action exemption can be seen in the facts of this case. **All agree that an integral part of California's state water policy is its prohibition against waste and unreasonable uses of water. 828 F2d, at 519 (citing Cal Court,** Art. 10, § 2; Cal Water Code Ann § 106.5 (West 1971)). Furthermore, the state policy expressly encourages municipalities to transfer water rights so as to improve the efficiency of water use. Cal Water Code Ann § 109 (West Supp. 1987). Here, petitioner water district alleged that respondent city controlled sources of water exceeding its annual needs, was in the business of reselling the surplus water for rural irrigation, and had entered a 35-year contract with petitioner, providing that petitioner would pay respondent $400,000 per year for 20,000 acre-

feet of water per year. The water district alleged that, contrary to past years under the contract, the city refused to allow the district to transfer excess water to third parties, who evidenced their need for it by their willingness to pay. The city sent a letter explaining its stance as necessary to effectuate the contractual provision requiring that the water be used only by the district. Because the city refused to allow the district to transfer the water to third parties and because the district did not need the water, it eventually ran into the state aqueduct, either to be wasted as run-off into the sea or to flow to communities outside of the Kern County water basin. Whatever the fate of the dumped water, petitioner alleges that the city prevented the transfer to maintain its control of the resale market for irrigation water in Kern County.

The irony of the Ninth Circuit's decision is its bestowing of antitrust immunity for such conduct based on a state statutory scheme, which is intended to promote efficient use of water and prevent its waste. It seems questionable that the contractual prohibition of transfer rights, possibly resulting in the waste of the water and certainly preventing an efficient transfer, was the kind of action that the California legislature contemplated when it enacted the statutory scheme. Hallie, supra, at 44, 85 L Ed 2d 24, 105 S Ct 1713. Municipal actions that contravene express limits in the state policy would not seem to be taken pursuant to a clearly articulated policy and thus would not seem to be shielded by the state action exemption. The Ninth Circuit's characterization of the alleged violation of state policy as an ordinary error or occasional abuse seems insufficient to insulate the municipality from liability for action that restrains competition. There seems little room in the Sherman Act's prohibition of restraint of trade for such a forgiving rule. Because I do not believe that every municipality deserves one free anticompetitive bite, I would grant certiorari.

ANTITRUST LAW

Cite as 88 Daily Journal D.A.R. 6102
Supreme Court of the United States

Kern Tulare Water District v. City of Bakersfield, California

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit
No. 87-1433. Decided May 16, 1988

The petition for a writ of certiorari is denied.

Justice White, dissenting.

828 F. 2d 514, 522 (1987).

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